

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DYSON TECHNOLOGY LIMITED)	
and DYSON, INC.,)	
Plaintiffs,)	
v.)	Civil Action No. 05-434 GMS
MAYTAG CORPORATION,)	REDACTED FOR PUBLIC FILING
Defendant.)	
)	

DEFENDANT HOOVER, INC.'S CORRECTED MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE THE TESTIMONY OF
PLAINTIFFS' EXPERT JOEL H. STECKEL REGARDING CAUSATION

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Defendant/Counterclaim Plaintiff Hoover, Inc. ("Hoover") respectfully moves this Court for an order excluding the testimony of Dyson's marketing expert, Joel H. Steckel, Ph.D., relating to the issue of causation.

I. FACTUAL BACKGROUND

Dyson seeks to offer the expert testimony of Dr. Joel Steckel,

consumers typically do not know that they have been deceived with respect to a purchase until the truth is revealed by a government announcement or court ruling. *See generally Price v. Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005); *Morris In the Matter of Warner-Lambert Company*, 86 F.T.C. 1398 (F.T.C. Dec. 9, 1975), *aff'd Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1997).

II. ARGUMENT

To be deemed reliable, an “expert’s opinion must be based on the ‘methods and procedures of science’ rather than on ‘subjective belief or unsupported speculation.’” *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994) (quoting *Daubert*, 509 U.S. at 590). The Third Circuit has enunciated the following factors, among others, to evaluate whether proffered expert testimony is reliable: (1) whether the method has been subject to peer review; (2) whether the method is generally accepted; and (3) the non-judicial uses to which the method has been put. See *In re Paoli*, 35 F.3d at 742 n.8 (citing *Daubert*, 509 U.S. at 593-94 and *U.S. v. Downing*, 753 F.2d 1224, 1238-39 (3d Cir. 1985)).

Peer review and general acceptance of the technique or methodology by the relevant scientific community are exceedingly important factors in determining the reliability of expert testimony. “[S]ubmission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in the methodology will be detected.” *Daubert*, 509 U.S. at 593. Further, a technique or method “which has been able to attract minimal [or no] support within the community may properly be viewed with skepticism.” *Daubert*, 509 U.S. at 594; see also

Downing, 753 F.3d at 1238. Accordingly, the Third Circuit has held that when a technique or methodology employed by an expert has not been subject to peer review or publication and is not generally accepted within the relevant scientific community, the expert's testimony based upon such technique or methodology is deemed unreliable and merely speculative and, therefore, must be excluded. See, *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 322 (3d Cir. 2003); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 148, 156, 158 (3d Cir. 2000); *Elcock v. Kmart Corp.*, 233 F.3d 734, 748-49 (3d Cir. 2000); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153-58 (1999).

Most importantly, relevant case law holds that post-purchase satisfaction surveys are not reliable evidence to prove that consumers have not been misled or deceived by a specific advertisements. *See E.T.C. v. I Pantron Corp.*, 33 F.3d 1088, 1097-98 (9th Cir. 1994). In *Pantron*, the Ninth Circuit explained that “evidence of consumer satisfaction is most obviously flawed” because consumers are not in a position to tell whether product claims are truthful. *Id.* at 1098. To rule otherwise, the Court reasoned, would encourage advertisers “to foist unsubstantial claims on an unsuspecting public in the hope that the consumers would believe the ads and the claims would be self-fulfilling” and allow “sellers to fleece large numbers of consumers who, unable to evaluate the efficiency of an inherently useless product, make repeat purchases of that product.” *Id.* at 1100.

Dr. Steckel’s causation opinion is unreliable according to the standards set forth in Rule 702, *Daubert*, and Third Circuit precedent, and must be excluded from trial.

Dated: April 17, 2007

Respectfully submitted,

HOOVER, INC.



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CERTIFICATE OF SERVICE

I, Francis DiGiovanni, hereby certify that on April 17, 2007, copies of the foregoing document were served on the following counsel of record in the manner indicated:

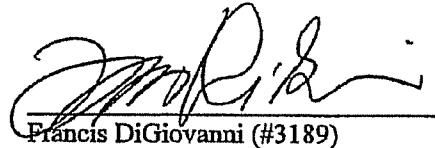
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